Pepperdine Dispute Resolution Law Journal

Volume 8
Issue 3
Negotiating, Mediating and Managing Conflict: Evolution in a Global Society

Article 5

4-1-2008

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[Vol. 8: 3, 2008]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Ten Essential Elements of an Effective Dispute Resolution Program

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Dispute resolution has evolved far beyond the early days when "ADR" was often taken to mean only mediation to be followed, if necessary, by binding arbitration. Now business lawyers and business executives realize even more acutely that disputes can be very costly, distracting and damaging to relationships and that formal arbitration can be nearly as expensive and protracted as litigation. What really benefits a company in a dispute is an early optimal outcome that takes into account a variety of considerations and dynamics that are often unique to the circumstances. Such an outcome requires thorough analysis and creative thinking about ADR approaches. While "winning" in litigation for one party is a favorable decision or verdict sustained on appeal, "winning" in dispute resolution is reaching an early optimal outcome. Of course, there will be situations in which even the best of efforts cannot avoid litigation or contractual binding arbitration.

For an organization with a significant number of outstanding lawsuits and pre-litigation claims, it is important to have a comprehensive and disciplined program of managing disputes to produce optimal outcomes with consistency, effectiveness and cost efficiency. Based on my experience at large, complex industrial companies with well over 2,000 litigation matters outstanding at any time, the effective management of the dispute portfolio requires that each matter be managed effectively and that more matters be resolved each year than the number of new matters that arise. The focus of this article is corporate law departments, but the concepts are applicable to any organization. To manage disputes when matters are being handled by a number of in-house lawyers and retained outside counsel requires adherence to a coherent system that has the following critical elements.

1. Practice the ADR Pledge. The right context for a company's systematic approach to dispute resolution is set by being signatory to the ADR Pledge maintained by CPR-The International Institute for Conflict

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Prevention and Resolution. The pledge provides that "In the event of a business dispute between our company and another company which has made or will make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation."[1] The mindset of always being willing to consider resolution approaches short of litigation is important. The pledge indicates a thoughtful commitment to efficient resolution of disputes and should eliminate the impression that any suggestion to use ADR is a sign of weakness on the litigation merits. After all, many courts now mandate mediation as part of the litigation process. The pledge also puts an emphasis on the skill of negotiating and drafting ADR clauses as part of the deal making or contracting process, rather than an afterthought often getting insufficient attention.

2. Apply Negotiation Skills. Negotiation is a skill that can be learned, practiced and perfected.[2] In the dispute resolution context, the exercise of this skill can properly shape agreement on the ADR procedures appropriate for the contract being negotiated, given the subject matter and the parties' relationships. Skillful and principled negotiations can also create the best channels for addressing a later dispute, or working out a settlement if litigation results.

3. Maintain a Dispute Management System. A thorough, documented dispute management system, or litigation management system, is critical to the efficient and consistent resolution of disputes and the management of litigation to optimal results for the organization. In the case of a company facing recurring issues, the system should have a pre-litigation component under which claims arising out of recurring events are anticipated and addressed in an attempt to resolve before litigation is filed.[3] A comprehensive dispute resolution program includes a systematic approach to early case assessment, setting case strategy, selection of counsel, consideration of ADR alternatives, preparation for discovery and trial, and case budgeting. Much of the cost of litigation is a function of cycle time from case inception to final resolution, and all steps in the management process should be focused on reducing this cycle time.

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1. *See The ADR Pledge*, *available at* http://www.cpradr.org/CMS_disp.asp?page=CPR_PledgeIntro&M=11.1 (last visited Apr. 1, 2008).

2. *See* JOHN W. COOLEY, CREATIVE PROBLEM SOLVER'S HANDBOOK FOR NEGOTIATORS AND MEDIATORS, VOLS. I & II (2005); *see also* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION MASTER GUIDE SERIES, DRAFTING DISPUTE RESOLUTION CLAUSES: BETTER SOLUTIONS FOR BUSINESS (2005).

3. *Pre-Litigation Management and Avoidance*, *in* SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL §2, (Robert L. Haig ed., 2006); *see also* Peter Aronson, *How Not to be Sued: Lawn Mower Maker Toro Moves Quickly to Mollify Victims*, NAT'L L. J., June 24, 2002.

4. Focus on Early Assessment. The first critical component of litigation management is early case assessment.[4] This sets the stage for counsel selection, evaluation of ADR opportunities and creative efforts at the outset that can shape the way a dispute plays out. Litigation rarely improves with age. The best chance to collect facts, analyze financial and reputational exposures, assess accruals and set initial strategy is in the first months after litigation is filed. Quantified decision tree analysis is essential to a thorough identification of issues and exposures and range of possible outcomes.[5] A case assessment, grounded in business context, is important to have to be ready to propose solutions or react to proposals received. While decision trees are only a guide to action, they help prepare counsel and clients to make fully informed business judgments.

5. Prepare for Trial. While creatively thinking about ways to reduce cycle time and reach an optimal early outcome, preparation for trial must proceed. There can be no assurance that resolution attempts will be successful. Trial counsel should be retained and early attention given to the scope of discovery, especially given the exhaustive methodologies and great expense now involved in electronic discovery to avoid missteps that could affect outcomes.

6. Manage the Settlement Process. Winning at trial or on appeal and negotiating a settlement require different skills not always found in the same person and not always best pursued in a particular matter by the same person. In-house lawyers should closely manage the settlement process since they best know the parties involved, the relationships, the business interests and attitudes and the relative importance of the issues and amounts involved. While many litigating lawyers are knowledgeable about and committed to ADR, they need not play both roles in a single matter. Having outside counsel focused on trial preparation while in-house counsel develops alternative resolution possibilities works effectively. However, a skillful litigator who can "advocate" an optimal outcome as well as be an advocate at trial can add great value to the process. Involving the right players at the right times is a skill best exercised byin-house counsel aware of all the dynamics of a matter.

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4. DVD: CPR Early Case Assessment (2006).

5. J. Bryan Whitworth, Clyde W. Lea, Marc B. Victor & Craig B. Glidden, *Evaluating Legal Risk and Costs with Decision Tree Analysis*, *in* SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL §12, (Robert L. Haig ed., 2006); Aronson, *supra* note 3.

7. Employ Creative ADR. Early assessment and management of the settlement process give in-house lawyers an opportunity to think beyond conventional mediation as an ADR approach. Given the nature of the dispute, the amounts involved and the parties' relationships, a wide array of possibilities should be considered. Since steps are taken by mutual agreement, are non-binding and can be subject to confidentiality, approaches can generally be pursued without risk and could produce beneficial results. Here are some examples:

- Proposing the parties jointly retain a common "evaluator" to give each party independently a frank assessment of the issues can be very helpful in eliminating the "emotional attachment" that a party may develop in its case and lead to serious negotiations.

- Having the "joint evaluator" act as mediator and, if no agreement is reached, ultimately proposing a fair result should also be considered.

- If a dispute is simple in nature, e.g., deciding between one reading of a contract provision versus another reading, the two arguments could be submitted to an agreed "expert" with minimal documentation and an agreement to abide by the expert's choice between the alternatives.

- Careful consideration should be given to the "style" desired of a mediator before appointment.[6] A mediator who is evaluative and can broker a result will often be most effective. Experience in the relevant subject matter, such as mergers and acquisitions or joint venture agreements or the parties' industry, can be very helpful.[7]

- If negotiations and mediation do not produce a result and a contract calls for arbitration, supplementary agreements can be made to expedite the arbitration process so it operates with the efficiency originally intended.

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6. *See* Stephen B. Goldberg and Frank A. E. Sanders, *Selecting a Mediator: An Alternative (Sometimes) to a Former Judge*, 33 LITIG. 40 (2007).

7. *See* James C. Freund, *Calling All Deal Lawyers – Try Your Hand at Resolving Disputes*, 62 BUS. LAW. 37 (2006).

8. Evaluate Your Case. Retaining a neutral evaluator unilaterally can be helpful in early case assessment or at any later point in the dispute management process. To get an advance view of the potential reception of a case, use of focus groups and mock trials can be quite effective in educating counsel and clients on risks and potential outcomes. They are useful not just to improve trial tactics, but also to provide input to analysis of resolution possibilities.

9. Consider a Larger Context. Putting a controversy in a larger context can promote dispute resolution. In a dispute over contract performance, it might help to propose accelerating negotiation of the renewal of the entire contract for a longer term and shift the focus of discussion to the mutual benefits that could result from a review of all terms. If another contract between the parties has pending disputes, joining the issues might increase the opportunities for "trades". It may lead to further insights to develop a complete listing of all business dealings and relationships between your organization and its affiliates and the other party and its affiliates, including potential contact points among officers and directors. Ideas may come out of the process that expand the approaches to be considered and avoid unintended consequences.

10.Reach Optimal Outcomes. ADR should not be expected to produce a complete "win" for either party. When analyzing a dispute, a set of optimal outcomes should be identified for your organization, all things considered. The analysis may be different if the dispute is over money alone as opposed to liability. It may differ given the relative importance of management time and distraction. It may differ over the nature of the dispute, reputational issues involved and precedents that may be set. In a few instances a trial to verdict and possible appeal may be viewed as the only route that could produce an acceptable result. Having addressed all of the other elements of a dispute resolution program should give lawyers and business executives the information, analysis and context to make a business judgment among resolution alternatives.

In conclusion, by a practical application of these ten essential elements of a dispute resolution program, an organization can be confident that it is taking the steps to bring disputes efficiently to resolution.